



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R10-OAR-2008-0903: FRL – 9768-5]

Approval and Promulgation of Implementation Plans; Oregon: Open Burning and Enforcement Procedures

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to approve revisions to Oregon's State Implementation Plan submitted to the EPA by the Oregon Department of Environmental Quality on February 16, 2001, July 14, 2005, August 28, 2006, and May 20, 2008. The February 16, 2001 submittal relates to open burning rules. The July 2005, August 2006, and May 2008 submittals relate to enforcement procedures, civil penalties, and procedures in contested cases (appeals).

DATES: Written comments must be received on or before **[Insert date 30 days after date of publication in the Federal Register]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA- R10-OAR-2008-0903, by any of the following methods:

- www.regulations.gov. Follow the on-line instructions for submitting comments.

- Mail: Justin A. Spenillo, EPA, Office of Air, Waste, and Toxics, AWT-107, 1200 Sixth Avenue, Suite 900, Seattle, Washington 98101
- E-mail: R10-Public_Comments@epa.gov
- Hand Delivery: EPA, Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. Attention: Justin A. Spenillo, Office of Air Waste, and Toxics, AWT-107. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions: Direct your comments to Docket ID No. EPA-R10-OAR- 2008-0903. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information the disclosure of which is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov or email. The www.regulations.gov Web site is an "anonymous access" system, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through www.regulations.gov, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you

for clarification, the EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

Docket: All documents in the electronic docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information the disclosure of which is restricted by statute. Certain other material, such as copyrighted material is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101.

FOR FURTHER INFORMATION CONTACT: Justin A. Spenillo at (206) 553-6125, spenillo.justin@epa.gov, or the above EPA, Region 10 address, <mailto:body.steve@epa.gov>

SUPPLEMENTARY INFORMATION: Throughout this document whenever “we,” “us,” or “our” are used, it is intended to refer to the EPA.

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I. This Action

Title I of the Clean Air Act (CAA), as amended by Congress in 1990, specifies the general requirements for states to submit State Implementation Plans (SIPs) to attain and maintain the National Ambient Air Quality Standards (NAAQS) and EPA's actions regarding approval of those SIPs. In this action, the EPA is proposing to approve and incorporate by reference revisions to Oregon's open burning rules submitted by the Oregon Department of Environmental Quality (ODEQ) on February 16, 2001. Oregon's open burning rules are currently codified at Oregon Administrative Rules (OAR) Chapter 340, Division 264.

The EPA is also proposing to approve but not incorporate by reference (with certain exceptions explained below) the enforcement provisions in Chapter 340, Division 12 submitted by ODEQ on July 14, 2005 and August 28, 2006.

We are also proposing to approve but not incorporate by reference revisions related to procedures in contested cases (that is, appeals from ODEQ actions) found at OAR Chapter 340, Division 11. These revisions were submitted by ODEQ on May 20, 2008.

Each of the above described submittals (the February 16, 2001, July 14, 2005, August 28, 2006, and May 20, 2008 submittals) contains an amendment to OAR 340-200-0040, which describes the State's procedures for adopting its Clean Air Act Implementation Plan and references all of the state air regulations that have been adopted by the Environmental Quality Commission for approval into the SIP (as a matter of state law), whether or not they have yet been submitted to or approved by the EPA. We are proposing no action on the revisions to OAR 340-200-0040 in each of ODEQ's SIP submittals because it is unnecessary to take action on a provision addressing State SIP adoption procedures and because the federally-approved SIP consists only of regulations and other requirements that have been submitted by ODEQ and approved by EPA.

Finally, the EPA is proposing to take no action on the expedited enforcement process set forth in OAR 340-150-0250 included in ODEQ's July 14, 2005 submittal because this section applies to underground storage tank regulations and does not relate to attainment or maintenance of the NAAQS or other requirements of section 110 of the CAA.

II. Why Are We Proposing To Approve These Revisions?

We are proposing to approve the SIP revisions submitted by ODEQ on February 16, 2001; July 14, 2005; August 28, 2006; and May 20, 2008, subject to the exceptions discussed in more detail below, because they serve to clarify and strengthen Oregon's existing SIP and are consistent with CAA requirements. A more detailed explanation of the basis for our approval is provided below and in the materials included in the docket.

A. EPA's Review of OAR Chapter 340, Division 264 Open Burning Rules (February 16, 2001 Submittal)

The federally-approved open burning rules previously codified at OAR Chapter 340, Division 23, have been recodified at OAR Chapter 340, Division 264. In addition to the recodification, ODEQ's February 16, 2001 submittal includes revisions to ODEQ's federally-approved open burning rules that fall into several categories: changes related to growth, additional requirements, delegation, alterations to exemptions, and clarifications. The first category of revisions updates the list of open burning control areas to reflect population growth since the SIP was last revised. For example, commercial burning is now prohibited except by permit in Madras, Tillamook, and Warranton, and adjoining areas within three miles of these cities' limits (all located in Lincoln County). See OAR 340-264-0100 (previously at OAR 340-023-055). In general, this category of revisions imposes more stringent requirements on additional geographic areas, and thus makes the open burning requirements more stringent.

A second category consists of revisions that impose additional requirements in all geographic areas and thus make the open burning regulations overall more stringent. For example, OAR 340-264-0050(2) (previously at OAR 340-023-0040) now requires that a person responsible for a fire not only constantly attend the open burning, but also be capable of and have the necessary equipment for extinguishing the fire and completely extinguish the fire before leaving it. As another example, OAR 340-264-0060(8) (previously at OAR 340-023-0040) requires that most open burning debris be burned on site unless a letter permit is issued.

OAR 340-264-0010 and -0075 are new provisions that allow ODEQ to delegate authority to issue and enforce open burning permits to a city, county, fire protection district, forest protection district or other state agency that ODEQ determines is capable of effectively administering the permit program and authorizes ODEQ to withdraw any such delegation upon a finding that the entity is not effectively administering the program. Given the narrow scope of the delegation to local agencies, that the delegated authority will continue to be carried out under the SIP-approved open burning regulations, and that ODEQ has the ultimate responsibility under this provision, EPA believes these provisions do not affect the stringency of ODEQ's open burning regulations and are consistent with the requirements of the CAA. See CAA 110(a)(2)(E).

Another category of revisions to ODEQ's open burning rules exempts open burning that is subject to restrictions under the current SIP. OAR 340-264-0040 (previously at OAR 340-023-0035) adds three narrow activities to the list of activities exempt from ODEQ's open burning rules: fires set for disposal of dry tumbleweed; agricultural burning for disease or pest control when authorized in writing by the Department of

Agriculture; and open burning of animal carcasses by the Department of Agriculture because of an animal disease emergency. That regulation also expands the exemption for slash burning on forest land conducted under Oregon's Smoke Management program to lands within one-eighth of a mile of forest land. Given the very narrow scope of these changes and the other revisions that make ODEQ's open burning rules more stringent than the open burning rules currently approved in the SIP, EPA believes these revisions will not interfere with attainment or maintenance of the NAAQS or other requirements of the CAA.

The remaining revisions clarify existing requirements. For example, revisions to OAR 340-264-0050 (previously at OAR 340-023-0040) clarify that persons responsible for open burning activities are also strictly liable for violations of the rules and clarify ODEQ's authority to extinguish existing fires. As another example, revisions to OAR 340-264-0040(3) (previously at OAR 340-023-035(3)) clarify that open burning fires otherwise exempt from the open burning rules are still subject to the requirements and prohibitions of local jurisdictions and the State Fire Marshall.

One set of clarifications to ODEQ's rules requires further discussion. Based on statutory clarifications to ODEQ's authority to regulate agricultural open burning in 1999, ODEQ has revised its open burning rules to make clear that it does not have authority to regulate agricultural open burning except for its explicit statutory and regulatory authority to regulate field burning in the Willamette Valley as provided in ORS 468A.555 to -620 and OAR Division 340, Chapter 266. The open burning rules currently in the SIP do have provisions that purport to make agricultural open burning in some areas outside of the Willamette Valley subject to the general statewide requirements

and prohibitions for open burning. See, e.g., OAR 340-023-022, -040, -042, -055, -060, -065, -070, -075, -080, -085, -090. The underlying statutory authority approved into the SIP, however, has for many years exempted all agricultural operations and the growing or harvesting of crops from regulation—except for field burning in the Willamette Valley regulated under ORS 468A.555 to 468A.620. See 56 FR 30006 (July 30, 1991); 60 FR 37013 (July 19, 1995). On December 27, 2011, EPA approved revisions to Oregon’s SIP which include statutory and regulatory changes narrowing the exemption for agricultural operations (76 FR 80747). These changes, however, narrow the agricultural operations exemption only to the extent necessary to meet the requirements of the CAA. Because there is no express requirement to regulate agricultural open burning in the CAA and no information showing that the lack of regulation of agricultural open burning in Oregon is interfering with attainment or maintenance of the NAAQS, the most recent SIP revisions to the agricultural operations exemption do not have a bearing on whether the regulation of agricultural open burning has ever been or currently is subject to regulation by ODEQ. EPA therefore concludes that agricultural open burning (except for field burning in the Willamette Valley) has not previously been subject to regulation by ODEQ under the SIP and, therefore, Oregon’s revision of its open burning rules to make this clear (and EPA’s approval of those revisions) does not affect the stringency of the SIP-approved open burning rules.

Based on EPA’s review and analysis of OAR Chapter 340, Division 264, EPA is proposing to approve this revision to Oregon’s SIP as meeting the requirements of section 110 of the Clean Air Act. In addition, EPA proposes to remove from the SIP the

regulations previously codified at OAR Chapter 340, Division 023 because they have been recodified and no longer exist at the location previously approved in the SIP.

B. EPA's Review of Division 12 Rules (July 14, 2005 and August 28, 2006 Submittals)

ODEQ has submitted two SIP revisions to OAR 340, Division 12, one on July 14, 2005 and one on August 28, 2006. Division 12 contains enforcement procedures and civil penalty provisions that apply across all programs implemented by ODEQ, including the air quality regulations that EPA has approved into the SIP. Division 12 provides the authority and procedures under which ODEQ notifies regulated entities of violations, determines the appropriate penalties for violations, and assesses penalties for such violations. The revisions to Division 12 made by ODEQ in 2005 and 2006 clarify the differences between formal and informal enforcement processes, make adjustments to the penalty matrices, and streamline and reorganize the rules to more closely track ODEQ's enforcement and penalty calculation process.

EPA has reviewed the revisions to Division 12 and finds that they continue to provide ODEQ with adequate authority for enforcing the SIP as required by Section 110 of the CAA and 40 CFR 50.230(b). Importantly, OAR 340-012-0160(3) gives ODEQ the discretion to deviate from the penalty matrices and assess penalties of up to \$10,000 per day, per violation based on the facts and circumstances of the individual case. EPA is therefore proposing to approve into the SIP the revisions to Division 12 submitted by ODEQ, subject to the qualifications and in the manner discussed below.

First, where ODEQ submitted a regulation in Division 12 as part of its July 14, 2005 submittal and that regulation was subsequently revised and submitted as part of ODEQ's August 28, 2006 submittal, EPA is proposing to approve the version of the regulation submitted as part of the August 28, 2006 submittal. The docket contains a chart showing the version of the regulations in Division 12 we are approving.

Second, EPA's authority to approve SIPs extends to provisions related to attainment and maintenance of the NAAQS and carrying out other specific requirements of Section 110 of the CAA. Therefore, EPA is not approving the following regulations in Division 12 that do not relate to air emissions: OAR-340-012-0055, -0060, -0065, -0066, -0067, -0068, -0071, -0072, -0074, -0079, -0081, -0083, -0097. In addition, EPA is approving the remaining sections in Chapter 340, Division 12 only to the extent they relate to enforcement of requirements contained in the Oregon SIP.

Finally, although EPA is approving the rules in Division 12 in the manner discussed above, EPA is not incorporating these rules by reference into the Code of Federal Regulations because EPA relies on its independent enforcement procedures and penalty provisions in bringing enforcement actions and assessing penalties under the CAA.

In approving these SIP revisions, EPA also notes that ORS 468.126 prohibits ODEQ from imposing a penalty for violation of an air, water or solid waste permit unless the source has been provided five days' advanced written notice of the violation and has not come into compliance or submitted a compliance schedule within that five-day period. By its terms, the statute does not apply to Oregon's Title V program or to any other program if the application of the notice provision would disqualify the program

from Federal delegation. Oregon has previously confirmed that, because the application of the notice provision would preclude EPA approval of the Oregon SIP, no advance notice is required for violation of SIP requirements.

C. EPA's Review of Division 11 Rules (May 20, 2008 Submittal)

Oregon's May 20, 2008 submittal revises OAR Chapter 340, Division 11, which addresses procedures in contested cases (appeals of ODEQ actions). These rule revisions were adopted by Oregon on October 17, 2007 and became effective on March 20, 2008. The rules were revised to improve the clarity and completeness of contested case appeals coming before the Environmental Quality Commission.

Division 11 provides authority needed for implementing the SIP and is consistent with the Clean Air Act requirements for the issuance of permits and enforcement authority. It is not appropriate to incorporate these rules by reference into the Code of Federal Regulations, however, because EPA relies on its own administrative and enforcement procedures in enforcing the Clean Air Act.

D. EPA's Review of OAR 340-200-0040 (February 16, 2001, July 14, 2005, August 28, 2006, and May 20, 2008 Submittals)

On February 16, 2001, July 14, 2005, August 28, 2006 and May 20, 2008, Oregon submitted revisions to OAR 340-200-0040. EPA is proposing no action on these revisions because it is unnecessary to take action on provisions addressing State SIP

adoption procedures and incorporating by reference all of the revisions adopted by the Environmental Quality Commission for approval into the Oregon SIP (as a matter of state law).

E. EPA's Review of OAR 340-150-0250 (July 14, 2005 Submittal)

ODEQ's July 14, 2005 SIP submittal included OAR 340-150-0250. We are taking no action on this submittal because this section applies to underground storage tank regulations and does not relate to attainment or maintenance of the NAAQS or other requirements of section 110 of the CAA.

III. Summary of Action

EPA is proposing to approve revisions to OAR, Chapter 340, Divisions 11, 12, and 264 because they are consistent with Clean Air Act requirements. We are also proposing to take no action on revisions to OAR, Chapter 340, Division 200-0040 submitted on February 16, 2001, July 14, 2005, August 28, 2006, and May 20, 2008 and OAR, Chapter, Division 150-0250 submitted on July 14, 2005 for the reasons discussed in Section II.

Oregon has not demonstrated authority to implement and enforce the Oregon Administrative Rules within "Indian Country" as defined in 18 U.S.C. 1151. Therefore, this proposed SIP approval does not extend to "Indian Country" in Oregon.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- is not subject to the requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Particulate matter, Reporting, and recordkeeping requirements.

Dated: December 27, 2012.

Kate Kelly,
Acting Regional Administrator,
Region 10.